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Q&A With Arnold & Porter's Bob Garrett

Law360, New York (August 31, 2011) -- Robert Alan Garrett is a partner in the Washington, D.C., office of Arnold & Porter LLP. Since joining the firm in 1977, Garrett has focused on copyright and telecommunications law, particularly as it affects the sports and entertainment industries and the distribution of their copyrighted works over new and traditional media. His clients have included the major professional sports leagues, motion picture studios, recording companies and broadcast and cable television networks.

Garrett has practiced extensively before the federal courts, the U.S. Copyright Office, the Copyright Royalty Board and its predecessors, the Federal Communications Commission, and Congress.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Several years ago we took on a copyright case (pro bono) for a homeless advocacy group in Washington, D.C., the Community for Creative Non-Violence (CCNV), shortly after the D.C. Circuit had ruled against them on a work-for-hire claim. The issue was whether CCNV owned the copyright in a statue (a nativity scene depicting a homeless family) that CCNV had commissioned from a Baltimore sculptor. We were successful in obtaining cert. And, as a good friend is fond of telling me, I would have won the case before the Supreme Court had I received only five more votes.

This was my first (and only, so far) argument before the court — meaning that I have lost about 100 fewer arguments in the court than Daniel Webster. Nothing really prepares you for that first time, no matter how many oral arguments you have delivered. It was the most challenging (and exhilarating) experience of my professional career — particularly since the solicitor general's office showed up on the other side.

It wasn't much easier after the argument, as the client insisted we have a press conference on the steps of the Supreme Court (where they brought the statue). The reporters' questions were just as tough as the justices'. "So, under your theory, is it correct that Pope Julius, and not Michelangelo, owned the copyright in the Sistine Chapel ceiling?"

Q: What aspects of your practice area are in need of reform and why?

A: For many years I have represented Major League Baseball — and served as lead counsel to a coalition of the major professional and collegiate sports leagues (the National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League and National Collegiate Athletic Association) — in proceedings to allocate royalties among thousands of copyright owners of TV programming. Cable operators and satellite services pay these royalties to retransmit broadcast TV programming pursuant to statutory licenses under the Copyright Act.

In years where the parties are unable to reach agreement on an allocation, the Copyright Royalty Board (a federal agency in D.C.) conducts evidentiary hearings to divide the royalties, subject to review by the D.C. Circuit. There have many such proceedings over the years conducted by the CRB and its predecessors. The underlying statutory provisions deliver on the government's promise to create more jobs — at least for copyright lawyers.

There is more than a billion dollars in royalties, covering years that go back more than a decade, that remain to be distributed to copyright owners. Much of the delay in distribution can be attributed to a system that has developed in a way that depends on virtually unanimous consent from all affected parties to move matters along. Congress sought to address issues involving these and related proceedings a few years back when it created the CRB. It may be that further congressional action will be necessary to ensure that copyright owners receive timely payment for the use of their copyrighted works.

Q: What is an important case or issue relevant to your practice area and why?

A: I represented the major broadcast networks and their affiliated motion picture studios in an action involving the issue of whether a so-called network digital video recorder service offered by a cable operator infringed the public performance right; network DVRs allow the cable subscriber to store the programs he or she wants recorded on a remote server rather than a set-top box.

It was a classic case of hard facts make bad law. The Second Circuit saw no difference between set-top DVRs (used by millions of cable subscribers for years) and network DVRs. To reach the result that network DVRs are not infringing, the court construed the public performance right in a manner that, I believe, improperly eviscerates that right. This is an important ruling because the public performance right has developed particularly significant value with the emergence of a host of new methods to deliver video over the Internet to various devices.

There is now pending a case in California that may test both the viability and the limits of that Second Circuit ruling. It involves a service that streams new-release movies to paying subscribers on demand, without the consent of the affected copyright owners — effectively circumventing various marketplace arrangements that the studios have with licensed services such as Netflix.

The service claims that it is not making public performances under the Second Circuit's ruling in the network DVR case. The first round has gone to copyright owners (a successful motion for a preliminary injunction). Presumably, however, the case will end up with the Ninth Circuit, which will need to decide how to treat the Second Circuit's ruling.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Don Verrilli. We worked together on a couple of cases while he was a in private practice at Jenner before he became U.S. solicitor general. He is a superb advocate as well as a gentleman who has not lost sight of the importance of being civil.

We both argued before a federal district court (Duluth, Minn.) in a file-sharing case involving the issue of whether U.S. copyright law recognized the making available right (which international treaties required the U.S. to recognize). Don argued for the record companies as plaintiffs and I for the motion picture studios as amici in support of plaintiffs. At the outset of the argument, the judge made clear that he had made up his mind (and not favorably to us); he thanked us for traveling from D.C. to Duluth (fortunately, it was not in the winter); and he told us we could take this opportunity to say whatever we wanted (no time limits).

As I checked for early flights back to D.C., Don proceeded to present one of the most compelling arguments I had ever heard. He was both responsive and deferential to the court and its concerns. At one point, the judge remarked, “You really are good.” Neither of us changed the outcome that day. But I believe everyone in the courtroom recognized that the judge was right (at least about Don).

Q: What is a mistake you made early in your career and what did you learn from it?

A: Cross-examining Fred Rogers (“Mister Rogers' Neighborhood”). I was the only person in an eight-party administrative hearing who thought it was a good idea to ask Mr. Rogers some questions. The others knew better. Mr. Rogers came across on the witness stand as the same kind and gentle person that had enthralled children (and apparently some judges) on TV for years. I thought at any moment he would slip into his slippers and cardigan and begin singing “It's a beautiful day in this neighborhood."

I got nothing out of him, and each question was usually answered with a question about whether and how much my kids liked his show. Sometimes the best cross is no cross. The good news, though, is that my kids later forgave me (I think) for crossing their hero, when he sent them autographed pictures of himself (in his cardigan and slippers).